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1 RECORD OF ORAL HEARING  
2 UNITED STATES PATENT AND TRADEMARK OFFICE  
3  
4 BEFORE THE BOARD OF PATENT APPEALS  
5 AND INTERFERENCES  
6

7 *Ex parte* CHRISTOPHE DUPONT  
8 MARC DAMBRINE, LAURENT SISIAC,  
9 THIERRY BAHAX, STEPHEN MAY and  
10 STEVEN E. DINGMAN  
11

12  
13 Appeal 2009-010871  
14 Application 09/833,314  
15 Technology Center 1700  
16

17 Oral Hearing Held: April 15, 2010  
18  
19

20 Before BRADLEY R. GARRIS, CHUNG K. PAK and  
21 MARK NAGUMO, *Administrative Patent Judges*  
22

23 ON BEHALF OF THE APPELLANT:

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29

1 JUDGE GARRIS: Good morning, Mr. Beckett.

2 MR. BECKETT: Hi.

3 JUDGE GARRIS: Sir, as you know, you have about 20  
4 minutes to present your case. Please begin.

5 MR. BECKETT: Good morning. I am here on behalf of the  
6 Appellants for U.S. Serial No. 09/833,314. Date of issue on  
7 this -- obviousness rejection, which I hope you agree is improper, as a matter  
8 of fact and law.

9 I primarily want to focus on some essential aspects of the  
10 claimed invention, and then just discuss a couple of the primary references,  
11 in view of the large plurality of the references, that were cited by the  
12 Examiner.

13 At this time, I'd like to discuss the invention in detail to clarify  
14 the scope of the claimed invention. Independent Claims 1 through 2, 6, and  
15 9 recite in part a canned pet food product.

16 This means that the claimed invention includes the following  
17 elements: A pet food product and a can containing the pet food product.

18 As understood by the skilled artisan, pet food products are  
19 distinguishable from other food products, such as food products for human  
20 consumption.

21 JUDGE NAGUMO: Where is the evidence for that in the  
22 record?

23 MR. BECKETT: It's just something that the skilled artisan  
24 would know. I mean, when you characterize a food product as a pet food  
25 product, it inherently has some qualities related --

26 JUDGE NAGUMO: I would feed my cat canned tuna, the same  
27 tuna that I would eat myself for dinner. I don't see -- I mean, I saw that  
28 argument in the Briefs, but I'm not quite sure why I should accept that as --

29 MR. BECKETT: Well, it's a --

30 JUDGE NAGUMO: And what impact that would have.

31 I mean, if we look at Vickers, Vickers describe a meat roll that  
32 has the same general shape, a cylinder -- a core.

1 MR. BECKETT: Mm-hmm.

2 JUDGE NAGUMO: And they have different textures. And so  
3 the step from there to the same product, it seems to me, is you put a can  
4 around it.

5 You can that meat roll.

6 MR. BECKETT: Mm-hmm.

7 JUDGE NAGUMO: There's lots of evidence in the record that  
8 indicates that canning various foods, including pet foods, in different  
9 configurations is well known.

10 MR. BECKETT: Mm-hmm.

11 JUDGE NAGUMO: So while I think we can all agree that the  
12 Examiner may have gone a little overboard, I don't think we can fault him  
13 for not presenting evidence that the distribution of food in a can is an  
14 obvious matter of design choice.

15 MR. BECKETT: Mm-hmm.

16 JUDGE NAGUMO: It seems to me that the Examiner has put  
17 up a pretty good case for that. Why is that -- ?

18 MR. BECKETT: Well, first of all, pet food products are  
19 formulated to readily be digestible, very palatable to animals, and contain  
20 necessary nutrients, trace elements for animals.

21 The question is, would you feed a pet food product to a human?  
22 And I think most people would say no.

23 JUDGE NAGUMO: I think a lot of people disagree. And I  
24 think there are a lot of people who -- I mean, as a child I used to eat kibble --

25 MR. BECKETT: Well, we're dealing with I guess the skilled  
26 artisan and the pet food manufacturing process as well, too.

27 I mean, you --

28 JUDGE GARRIS: Let's not go -- please answer Judge  
29 Nagumo's question.

30 MR. BECKETT: Mm-hmm.

31 JUDGE GARRIS: Do you have evidence -- in the appeal  
32 before us that an artisan would have distinguished between a canned food

1 product that is meant to be fed to a pet versus a canned food product meant  
2 to be fed to a human?

3 MR. BECKETT: No explicit evidence, other than the term  
4 itself.

5 JUDGE GARRIS: Then let's go on, then, to the remainder of  
6 your argument.

7 MR. BECKETT: Okay.

8 And this is just to build on my previous discussion.

9 Example 1 of the pending application discloses that the outer  
10 can, outer face comprises a -- mixture prepared from 53 percent of poultry  
11 carcasses, pig lungs, and beef liver. The interface can be prepared from a  
12 ground meat mixture of about 73 percent of poultry carcasses, pig's lung,  
13 and beef liver, and about 2 percent of powdered beef plasma, among other  
14 things, which are, again, directed toward animal products.

15 The skill artisan understands that describing a pet food product  
16 inherently gives the food product attributes that distinguish it from a human  
17 product, which are generally not designer-suitable for consumption by  
18 animals.

19 Practically speaking, the -- skilled artisan would not serve pet  
20 food products to humans, and vice versa. Independent Claims 1 through 2, 6  
21 and 9 further recite that the canned pet food product comprises an outer  
22 tubular phase, which extends from the lower end to the upper end, and a  
23 substantially cylindrical inner phase, which extends from the lower end to  
24 the upper end.

25 The canned pet food product has the advantage of having an  
26 attractive appearance.

27 JUDGE GARRIS: Let's not talk about attractive appearance.  
28 Let's just deal with the issue. What in this claim, in your mind, distinguishes  
29 over the prior art? Focus on Claim 1.

30 MR. BECKETT: That's what I said. The phases --

1 JUDGE GARRIS: You know there are cans in the prior art.  
2 And we know there are food products. I know you tried to distinguish  
3 between pet versus human food.

4 MR. BECKETT: Mm-hmm.

5 JUDGE GARRIS: But aside from all that.

6 MR. BECKETT: Okay.

7 JUDGE GARRIS: Please tell us what in this claim would you  
8 first point out as distinguishing over the prior art --

9 MR. BECKETT: Well, focusing primarily on May, Vickers,  
10 and Ohba, May --

11 JUDGE GARRIS: I think Ohba is the primary reference the  
12 Examiner might be looking at --

13 MR. BECKETT: Ohba relates to a vertically and horizontally  
14 packed foods containing two or more pet food products. Ohba does not -- an  
15 inner face comprising an emulsion product and gravy, and Ohba's product is  
16 produced using a completely different process.

17 For example, Ohba teaches using edible sheets to separate  
18 solidified food layers that are arranged in the desired configuration --

19 JUDGE GARRIS: And what in Claim 1 is relevant to these  
20 kinds of arguments? We want to know what in Claim 1 specifically -- you're  
21 looking at to define --

22 MR. BECKETT: Well, to distinguish from Ohba, Claim  
23 includes -- well, all the claims include the outer tubular phase. Ohba does  
24 not disclose an outer tubular phase.

25 JUDGE GARRIS: Is that known in the art? Is the arrangement  
26 of an annular food product surrounding a cylindrical food product known in  
27 this prior art --

28 MR. BECKETT: In other food products, not a pet food  
29 product.

30 JUDGE NAGUMO: Well, what about May? May describes a  
31 canned pet food that's got two different phases and the texture and  
32 phases -- the -- on page 2 of the May reference, the recess in the base layer

1 can extend partially or all the way through that base layer. That's lines 26 to  
2 29.

3 And the top layer, it's not clear whether it has to cover the entire  
4 top, or whether it can terminate.

5 But now you've got a conical shaped central cavity.

6 MR. BECKETT: Mm-hmm.

7 JUDGE NAGUMO: With an outside tubular section.

8 MR. BECKETT: Mm-hmm.

9 JUDGE NAGUMO: I think Claim 1 says substantially  
10 cylindrical inner phase.

11 MR. BECKETT: Mm-hmm.

12 JUDGE NAGUMO: Substantially is a pretty broad, loose term.

13 MR. BECKETT: Mm-hmm.

14 JUDGE NAGUMO: But even if the frustum was excluded by  
15 substantially cylindrical, we've got Vickers, which shows a substantially  
16 cylindrical food product.

17 MR. BECKETT: Mm-hmm.

18 JUDGE NAGUMO: Let's even for the sake of argument say  
19 that pet food and people food are just completely different.

20 But still, we've got the suggestion of the geometry and the  
21 texture.

22 MR. BECKETT: Mm-hmm.

23 JUDGE NAGUMO: So we've got a simpler texture and a  
24 broadly similar geometry. Why is it not obvious?

25 MR. BECKETT: All right. With respect to Claim 1, that  
26 probably is the weakest one with respect to Vickers. Again, with Claim 1,  
27 the substantially cylindrical inner phase is really the primary argument for  
28 separating Claim 1 from Vickers.

29 However, with Claims 2, 6, and 9, there is a number of  
30 additional different distinguishing elements, such as the processes that are  
31 forming the product in Claims 2 and 9. They're doing by completely  
32 different processes.

1           Vickers puts down a meaty layer with gravy fluid layer, spins it  
2 around. And after it's spinning or during its spinning, then puts a solidified  
3 layer on top; whereas Claims 2 and 9 require filling the can with an outer  
4 phase, outer solidified layer, forming a bore in that layer, and then pouring  
5 the gravy inside.

6           JUDGE NAGUMO: But these are product by process claims.  
7 The way that you make the product only makes a difference in the claim  
8 product.

9           MR. BECKETT: Well, Claim 2 is. Claim 9 is an actual  
10 process.

11           JUDGE NAGUMO: Can you show me, tell me where in the  
12 record these separate arguments were made for the patentability of the  
13 dependent claims?

14           MR. BECKETT: I think they were just generally related to in  
15 that the prior art fails to disclose each and every single element of the  
16 claims. And I'm just elaborating on additional weaknesses.

17           JUDGE NAGUMO: Well, this is important to us, because  
18 reviewing your arguments in the Brief, I found very little other than a  
19 statement of what those claims recited.

20           MR. BECKETT: Mm-hmm.

21           JUDGE NAGUMO: And so I'm concerned whether or not  
22 you've really presented a separate argument for patentability for those  
23 claims.

24           Particularly given the product by process status of those claims.

25           MR. BECKETT: Well, I'm also --

26           JUDGE NAGUMO: And particularly as far as Claim 9 goes,  
27 can you tell me where in the Brief you've argued that as a separate --

28           MR. BECKETT: Well, that was more in addition to answer  
29 your question as well. Which is --

30           JUDGE GARRIS: You understand, of course, that oral  
31 arguments have to be based on your brief.

32           MR. BECKETT: Mm-hmm.



1 JUDGE GARRIS: You can't come in here and present for the  
2 first time an argument at oral hearing that you have never previously  
3 presented to the Examiner in the Brief.

4 MR. BECKETT: Mm-hmm.

5 JUDGE GARRIS: Otherwise, the Examiner never has an  
6 opportunity to even know that you've presented the argument, much less an  
7 opportunity to respond to it.

8 MR. BECKETT: Yeah. Yeah. And I again just was  
9 addressing some specific answers to his questions.

10 JUDGE GARRIS: Well, then maybe you could focus, then on,  
11 again, what is thought to distinguish, for example, Claim 1, or for that  
12 matter -- product of Claim 2 I guess, from the prior art that Judge Nagumo  
13 has been discussing.

14 We need to know what specific limitations are in your claims  
15 that you considered to patentably distinguish over this prior art?

16 MR. BECKETT: Yeah. Well, in addition, the substantially  
17 cylindrical face having the formulated emulsion product in the gravy is  
18 distinguished over Vickers as well.

19 JUDGE NAGUMO: But that's not a limitation of Claim 1.

20 MR. BECKETT: Yeah. Again, with Claim 1 it's pretty much  
21 the substantially cylindrical interface, which primarily distinguished it over  
22 Vickers.

23 JUDGE NAGUMO: And Claim 2 doesn't have any  
24 compositional differences. It seems to recite just the making the, putting the  
25 outer phase -- the can first, and then making a bore into the outer phase, and  
26 then filling that hole and sealing the can.

27 MR. BECKETT: Yeah.

28 JUDGE NAGUMO: So the ultimate product is substantially  
29 the same.

30 MR. BECKETT: Well, I guess that you wouldn't be able to  
31 produce or form a bore in the outer layer or the base layer of May, because  
32 it's made of solid food pieces and gravy, which is why they spin it around.

1 JUDGE NAGUMO: And how does the product differ?

2 MR. BECKETT: Well, because forming a bore in an outer  
3 phase would I guess lead inherently to the fact that it has some kind of  
4 solidified base that would --

5 JUDGE NAGUMO: What findings of fact of record -- on this  
6 could I make that would support that --

7 MR. BECKETT: Well, I might just be elaborating in more  
8 detail; but I am just describing more in detail, I guess, the claimed invention  
9 a little bit more thoroughly than was described maybe in the Appeal Brief or  
10 the Reply Brief.

11 JUDGE GARRIS: You have little time left. Would you care to  
12 perhaps summarize your basic --

13 MR. BECKETT: Okay.

14 And again, just besides distinguishing over the process claims,  
15 or the product by process and Claim 6, which involves the inner phase  
16 having the formulated emulsion product in gravy, I'd say the skilled artisan  
17 would have no reason to combine the cited references, because they each are  
18 made by different manufacturing processes suited for their specific particular  
19 configuration.

20 May, Vickers, and Ohba each teach a different manufacturing  
21 process to get into final claimed product. If a proposed modification  
22 changes the principle of operation of the inventions, then the references are  
23 not combinable.

24 And in view of the discussions that I have previously stated in  
25 our Appeal Brief, we respectfully submit that the obviousness rejection is  
26 improper.

27 JUDGE GARRIS: Judge Pak, any questions?

28 JUDGE PAK: No.

29 JUDGE GARRIS: Judge Nagumo, any further questions?

30 JUDGE NAGUMO: No.

31 JUDGE GARRIS: Okay. Thank you very much for --

32 MR. BECKETT: Thank you for your time.

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Application 09/833,314

Whereupon, at 10:03 a.m., the proceedings were concluded.